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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ANHEUSER-BUSCH, INC., *et al.*,
Petitioners,

v.

MAYOR AND CITY COUNCIL
OF BALTIMORE CITY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Daniel J. Popeo
David A. Price
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302

Deborah K. Owen
Lewis Rose
Kimberly L. Myers
ARENT FOX KINTNER PLOTKIN
& KAHN
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 857-6000

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INTEREST OF THE *AMICUS CURIAE*

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center with more than 100,000 supporters nationwide. Among the constitutional rights that WLF defends in judicial and administrative proceedings is the right of commercial free speech. To

that end, WLF has often appeared before this Court and other federal and state courts as an *amicus* in commercial free speech cases, including *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993); *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91 (1990); *Pacific Gas & Elec. Co. v. Public Utility Comm'n*, 475 U.S. 1 (1986); and *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980).

Here, the Fourth Circuit's approach to the third prong of the *Central Hudson* test not only upheld a content-based ban on expression, but did so without even a minimal opportunity for Petitioners to engage in discovery and to present evidence. The Fourth Circuit's rationale, if followed widely by lower courts and other circuits, could lead to widespread denial of commercial speech rights.

All parties to this action have consented to WLF's participation. Consent letters from counsel have been lodged with the Clerk of the Court.

SUMMARY OF ARGUMENT

The decision below upheld, against First Amendment challenge, a content-based prohibition on certain signs in Baltimore, Maryland, while disregarding evidence which Petitioners proffered on the issue of the *Central Hudson* test. The City of Baltimore's criminal ordinance substantially restricts the outdoor advertising of alcoholic beverages pursuant to a scheme that can best be characterized by the recent words of this Court in *Rubin v. Coors Brewing Company*, 115 S. Ct. 1585, 1593 (1995): "a unique and puzzling regulatory framework" permeated by "irrationality." In their challenge to the Ordinance, Petitioners were denied the opportunity to impeach the

City's evidence of cause and effect between alcohol advertising and consumption. This case is, then, the next logical step beyond *Rubin* and others, where this Court found that the legislature had relied on little or no empirical evidence. The issue here is the appropriate standard for judging the evidentiary basis upon which the legislature professes to rely.

Since *Central Hudson*, the Circuits have split between requiring, as this Court most recently did in *Rubin*, that "a governmental body seeking to sustain a restriction on commercial speech must *demonstrate* that the harms it recites are real and that its restriction will *in fact* alleviate them to a material degree," 115 S. Ct. at 1592 (quoting *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993)) (emphasis supplied), and requiring merely, in the words of the Fourth Circuit, that it be "*reasonable* for the legislative body to conclude that its goal would be advanced in some material respect by the regulation." *See* Appendix to Petitioners' Petition for Writ of Certiorari at 14a (emphasis supplied) (hereafter "Pet. App."). The lack of a clearly defined standard encourages courts to choose the approach that most likely comports with their own policy views. Moreover, even in a complex case, the approach taken by the Fourth Circuit would, as acknowledged by another Circuit which took the same approach, allow truthful and undeceptive advertising information to be prohibited based merely on the trial judge's (and presumably the legislature's) "own knowledge and common sense." *See Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 747 (5th Cir. 1983) (en banc), *cert. denied*, 467 U.S. 1259 (1984).

The Fourth Circuit erroneously assumed that there are only two alternatives under *Central Hudson*'s third prong: unbridled judicial involvement in reviewing legislative

determinations as to the Ordinance's direct and material advancement of its goal, or total judicial deference in commercial free speech cases. So long as this Court continues to subscribe to the *Central Hudson* intermediate scrutiny approach,[1] a reasonable middle ground exists, which this Court should now clarify, to prevent *both* wholesale judicial second-guessing *and* blanket judicial endorsement of legislative conclusions. Such an approach preserves meaningful review to ensure protection of the legitimate exercise of First Amendment commercial speech rights. The Fourth Circuit's approach, in contrast, amounts to no review at all.

ARGUMENT

I. The Fourth Circuit's Failure to Hold the City to Its Burden of Proof Exemplifies the Problems Stemming from the Disarray Among the Circuits in Interpreting the Third Prong of the *Central Hudson* Test.

The burden is on the government to justify regulation of commercial speech that concerns a lawful activity and is not misleading. A municipality must: (1) assert a substantial interest in support of its regulation; (2) demonstrate that the regulation advances that interest "in a direct and material way"; and (3) demonstrate that the asserted government interest could not "be served as well by a more limited restriction on commercial speech." *Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447

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[1] The alternative is the approach advocated by Justice Stevens in his concurring opinion in *Rubin*. *See* 115 S. Ct. at 1594.

U.S. 557, 564 (1980). As the Fourth Circuit correctly recognized, the dispute in this case revolves around whether Baltimore has proper justification for its Ordinance under the latter two of these factors — commonly known as the third and fourth prongs of *Central Hudson*'s four-prong standard of "intermediate scrutiny" review for commercial speech. *See* Pet. App. at 13a; *Rubin*, 115 S. Ct. at 1591.

The Fourth Circuit, in determining that Baltimore's Ordinance met the *Central Hudson* test for the restriction of commercial speech, stated:

> There is a *logical nexus* between the City's objective and the means it selected for achieving that objective, and it is not necessary, in satisfying *Central Hudson*'s third prong, to prove conclusively that the correlation in fact exists, or that the steps undertaken will solve the problem. . . . The proper standard for approval must involve an assessment of the *reasonableness* of the legislature's belief that the means it selected will advance its ends.

Pet. App. at 16a-17a (emphasis supplied). On this basis, the Fourth Circuit declined to consider even the barest contrary evidence that Petitioners submitted — an even more extreme approach than other circuits that have adopted a "reasonableness" test. *See, e.g., Dunagin*, 718 F.2d at 738; *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

In interpreting *Central Hudson*'s standard as one requiring only a "logical nexus" and a "reasonable belief"

that the means will directly and materially advance the end, the Fourth Circuit reduced the *Central Hudson* test from one of "intermediate scrutiny" to one of mere "rational basis" review, as evidenced by its refusal to even look at contrary, compelling evidence. Such an approach flies in the face of this Court's pronouncements regarding the proper review of commercial speech regulations: the legislature is required in an intermediate level of constitutional review to "demonstrate that the harms it recites are real and that a restriction will in fact alleviate them to a material degree." *Rubin*, 115 S. Ct. at 1592 (quoting *Edenfield*, 113 S. Ct. at 1800). *See also Ibanez v. Florida Dep't of Business & Professional Regulation*, 114 S. Ct. 2084, 2089 (1994).

The straying of the Fourth Circuit from this Court's standard is not unique. Since *Central Hudson*, and even since *Edenfield* and its progeny clarifying *Central Hudson*'s standard, lower courts have exhibited some confusion regarding the third and fourth prongs and the requisite level of intermediate scrutiny. Some circuit courts have approached regulation of commercial speech by requiring the government to put forth empirical proof, under a "preponderance of the evidence" burden, to demonstrate the requisite direct and material advancement of the asserted goal. *See, e.g., MD II Entertainment, Inc. v. City of Dallas*, 28 F.3d 492 (5th Cir. 1994); *Cal-Almond, Inc. v. United States Dep't of Agriculture*, 14 F.3d 429 (9th Cir. 1993); *Adolph Coors Co. v. Bentsen*, 2 F.3d 355 (10th Cir. 1993), *aff'd sub nom. Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995). Others, however, have delegated their constitutional mandate to protect the First Amendment to the legislature, and have refused to subject the government to a "preponderance of the evidence" burden. *See, e.g., Dunagin*, 718 F.2d at 738; *Crisp*, 699 F.2d at 490.

The latter approach has reached its nadir here. The Fourth Circuit's Rule 12(b)(6) dismissal of Petitioners' First Amendment challenge to a regulation of protected commercial speech may apparently be without precedent (*see* Petition at 11). Indeed, the Fourth Circuit overruled the trial court judge who had at least tried to give a paltry semblance of fairness by converting the motion to one for summary judgment. The Fourth Circuit's pleading stage dismissal was inevitable given the continuing practice of some lower courts to interpret *Central Hudson*'s standard as a lower level, "rational basis" review — a standard, ironically, that amounts to judicial activism by forsaking the duty of the judiciary in First Amendment cases to the court's sympathy with legislative policy.

Despite its inevitability, such a dismissal stands in stark contrast to this Court's repeated statements that deference to legislative findings simply cannot limit judicial inquiry where significant Constitutional principles are at stake. *See Sable Communications of California, Inc.* v. FCC, 492 U.S. 115, 129 (1989); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978); *Scheuer v. Rhodes*, 416 U.S. 232, 236, 249 (1974). *See also Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc.*, 943 F.2d 644, 651 n.9 (6th Cir. 1991). We therefore respectfully urge this Court to grant certiorari in this case for purposes of clarifying how the lower courts should exercise the intermediate scrutiny required under *Central Hudson*, and how governments seeking to regulate commercial speech can meet the burden of proof imposed by *Central Hudson*.

II. The Fourth Circuit's Refusal To Consider Petitioners' Evidence, in Disregard of *Central Hudson*, Sets a Dangerous Precedent.

Baltimore has asserted that its Ordinance "restricting the placement of advertisements for alcoholic beverages in publicly visible locations within Baltimore City is necessary for the promotion of the welfare and temperance of minors exposed to such advertisements." Pet. App. at 54a. Baltimore's Ordinance contains a preamble which sets forth, as support for the alleged "necessity" of the Ordinance, select judicial opinions and excerpts from a limited number of state and federal government reports. Pet. App. at 50a-54a.

On this basis, the court below dismissed Petitioners' suit on the pleadings. But this case is not one properly resolved even at the summary judgment stage, let alone dismissed on the pleadings. Petitioners were entitled to the opportunity to show that the City of Baltimore's grounds for its decision to circumscribe the First Amendment rights of alcohol advertisers and legitimate adult consumers were derived from political and/or controverted sources. Petitioners were entitled to the opportunity to obtain and present evidence that the case law and four studies cited in the Ordinance's Preamble and legislative history, contrary to the Fourth Circuit's conclusion, do not "demonstrate in fact" that the restriction of outdoor signs advertising alcoholic beverages "directly advances" Baltimore's campaign against underage drinking.

Moreover, it is not proper for a court to uphold a restriction on speech based on indiscriminate "judicial notice" of the restriction's direct and material advancement of its goal. For every opinion that takes judicial notice of

a positive correlation between advertising and behavior, another exists which requires more than a "legislature's commonsense judgment," which the Fourth Circuit found sufficient here, that the regulation will directly and materially advance the governmental interest. Pet. App. at 15a-16a. *See, e.g., Linmark Assoc. v. Township of Willingboro*, 431 U.S. 85 (1977) (holding that an ordinance prohibiting "For Sale" or "Sold" signs on residential property was not justified by municipality's perception that such a prohibition would reduce the flight of white homeowners from a racially integrated neighborhood); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (holding that a prohibition of contraceptive advertising was not justified on grounds that ads would legitimize sexual activity of young people).

Here, the City of Baltimore was selective in choosing its evidence. For instance, nowhere on its list appears the contrary 1990 conclusion of the Federal Trade Commission ("FTC"), an independent agency which has scrutinized alcohol advertising for decades. In testimony before the U.S. House of Representatives Commerce Committee, the FTC noted:

> The Commission believes that the evidence is inconclusive on the issue of the linkage between alcohol advertising and consumption. There are studies that appear to support either position, and this same conclusion is expressed in the recent report on alcohol and health by the Department of Health & Human Services.

See Health Warnings on Alcoholic Beverage Advertisements: Hearing on H.R. 4493 Before the Subcomm. on Transportation and Hazardous Materials of

the House Comm. on Energy and Commerce, 101st Cong., 2d Sess. 35-41, at 37 (1990) (prepared statement of the FTC) (citing U.S. Dept. of Health and Human Services, *Alcohol and Health* 211-12 (1990)). The FTC suggested that the inconclusiveness of the evidence may be due to the limits of the available research methodology, *id.*; if true, this observation further underscores that Petitioners here should have had an opportunity to impeach the City's evidence.[2]

In deciding to take "judicial notice" of assumptions made by Baltimore in its own favor, and to rely unquestioningly on reports chosen by Baltimore for inclusion in the Ordinance's legislative history, the Fourth Circuit has set a troubling precedent. If, based on limited evidence, a legislature may indeed properly determine that advertising on signs increases children's consumption of any product that the government may regulate for health reasons, then under the Fourth Circuit's rationale, a legislature may properly restrict such advertising (or other forms of advertising) without meaningful judicial review.

Thus, Baltimore's selective evidence, if left unchallenged, might be taken to justify a ban on certain products displayed in movies. *See, e.g.*, M.L. Miller, *Note: The First Amendment and Legislative Bans of Liquor and Cigarette Advertisements*, 85 Colum. L. Rev. 632, 651 (1985). Similarly, recent medical studies suggest that if children's eating habits do not change early in life, obese children are likely to become obese adults susceptible to

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[2] For the Court's convenience, a copy of the FTC's statement before the House Energy and Commerce Committee, cited herein, has been lodged with the Clerk of the Court.

early death and a variety of diseases. *See, e.g.*, S. Squires, *For U.S. Youth, Weight Becomes Growing Problem*, Wash. Post, Oct. 3, 1995, at A1; S.S. Gidding et al., *Improving Children's Heart Health: A Report From The American Heart Association's Children's Heart Health Conference*, 65 J. School Health 129 (Apr. 1995); M. Corey, *Sizing Up A Generation*, Balt. Sun, Mar. 19, 1995, at 1K (noting that top ten foods purchased by teen-agers are gum, ice cream, fast-food hamburgers, chocolate candy, pizza, nonchocolate candy, breath mints, cookies, hard candies and potato chips). Under the Fourth Circuit's deferential reasoning, Baltimore could properly restrict outdoor signs of high-fat "junk" foods, such as fast-food french fries, snackcakes and candy, should it so desire. Surely, the third prong of *Central Hudson* is not as flaccid as the Fourth Circuit's opinion would indicate. If the lower courts disregard *Edenfield*'s clarification of the *Central Hudson* test, the First Amendment will be subordinated to every community's evolving attitudes. The First Amendment, however, is and must be grounded on a firmer foundation.

Because the Fourth Circuit deferred to Baltimore's judgment without question at the pleading stage, it prevented the discovery necessary to develop a record comparing the actual number of advertisements affected by Baltimore's Ordinance with the actual number remaining in the city subject to the view of minors. Thus, the type of evidence critical to this Court's decisions in *Rubin* and *Discovery Network* does not even exist in this case. This case therefore goes well beyond the common issue of whether an appellate court "correctly" resolved a First Amendment challenge after considering the parties' respective evidence, because the Fourth Circuit abdicated its Constitutional responsibility of judicial inquiry.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

DANIEL J. POPEO
DAVID A. PRICE
Counsel of Record
Washington Legal Foundation
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302

DEBORAH K. OWEN
LEWIS ROSE
KIMBERLY L. MYERS
Arent Fox Kintner
Plotkin & Kahn
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
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